Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

HENRY BLUME LOE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED FOR REVIEW [1]

I.

Whether the Government's successful appeal of the dismissal of counts for insufficient evidence, on a motion made pursuant to Fed.R.Crim.Proc. 29(a), and granted pursuant to Fed.R. Crim.Proc. 29(b), violates the double jeopardy clause of the Fifth Amendment.

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[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Blume Loe respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on August 14, 2001, to decide the important question of federal law presented herein.

OPINIONS DELIVERED IN THE COURTS BELOW

The November 5, 1999 "Order" granting Henry Blume Loe's motion for judgment of acquittal as to counts 1-5 of the superseding indictment is not reported. It is attached to this petition as Appendix "C". The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is reported as *United States v. Loe*, 262 F.3d 427 (5th Cir.2001). The opinion is attached to this petition as

Appendix "B". By order entered on September 26, 2001, the Fifth Circuit denied Loe's petition for rehearing. This order is attached to this petition as Appendix "A".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In July and August, 1999, Henry Blume Loe was tried by a jury on a ten-count indictment in the United States District Court for the Eastern District of Texas. At the conclusion of the Government's evidence, Loe moved for a judgment of acquittal pursuant to Fed.R.Crim.Proc. 29(a), both orally, and in writing. The motion was taken under advisement by the district court. Thereafter, Loe was convicted on all 10 counts of the indictment. The district court then granted the motion for judgment of acquital as to counts 1-5. On December 10, 1999, a judgment and conviction order on the remaining five (5) counts was entered against Loe, sentencing him to twenty-four (24) months imprisonment, and imposing a fine of $50,000. Loe timely filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit, as did the United States.

On August 15, 2001, the Court of Appeals issued an opinion affirming Loe's conviction and sentence on the five counts he had appealed (counts 12-16). In addition, the Court of Appeals reversed the district court's judgment of acquittal on counts 1-5, and remanded the case for resentencing. Loe timely filed a petition for rehearing. On September 26, 2001 the Court of Appeals denied the petition for rehearing. In accordance with Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the date of the order denying the petition for rehearing.

Accordingly, this Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1254(1). *See* Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

Title 18, United States Code, Section 3731 provides, in pertinent part, as follows:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Federal Rule of Criminal Procedure 29 provides as follows:

> **Rule 29. Motion for Judgment of Acquittal**
>
> **(a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> **(b) Reservation of Decision on Motion.** The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged

without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Same: Conditional Ruling on Grand of Motion. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

STATEMENT OF THE CASE

INTRODUCTION

"Confused" is the word most often used in the last twenty years to describe the present state of the law regarding the interaction between the Government's statutory right to appeal and the double jeopardy clause of the Fifth Amendment. *See, e.g., Unlimited Power: Rule 29(A) and the Unreviewability of*

Directed Judgments of Acquittal.[1] Indeed, several justices on the Court have themselves used the term: "It is regrettable that the Court should introduce such *confusion* in an area of the law that, until today, had been crystal clear." *United States v. Scott*, 437 U.S. 82, 115 (1978) (Justice Brennan, joined by Justices White, Marshall, and Stevens, dissenting)(emphasis added).

In 1994, Rule 29 of the Federal Rules of Criminal Procedure was amended, presumably to bring some order to the confusion. This was done by adding an amendment that permitted "the reservation of a motion for a judgment of acquittal made at the close of the government's case in the in the same manner as the rule now permits for motions made at the close of all the evidence." *Notes of the Advisory Committee on Rules, 1994 Amendment.*

In the view of the Advisory Committee, this Amendment not only permitted "the trial court to balance the defendant's interest in an immediate resolution of the of the motion against the interest of the government in proceeding to a verdict . . .," it also preserved the Government's statutory right to appeal: ". . . . thereby preserving [the government's] right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. * * * Thus, the government's right to appeal a Rule 29 motion is only preserved whether the ruling is reserved until after the verdict." *Id.*

This view of Rule 29(b) has been embraced by the Department of Justice, as is evidenced by this case. Such a view, however, only adds to the confusion, as it ignores the plain language of Rule 29, and is contrary to the rulings of this Court. In short, petitioner Loe contends that when a judgment of acquittal has been granted under Rule 29(b) of the Federal Rules of Criminal Procedure, the government has no right to appeal.

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[1] Sauber, Richard, and Waldman, Michael, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am.U.L.Rev. 433 (Winter, 1994)

THE SPECIFIC FACTS OF THIS PROCEEDING

Henry Blume Loe's trial by jury began July 21, 1999. On August 5, 1999, the Government rested its case-in-chief. Immediately thereafter, on that same day, counsel for Henry Blume Loe orally moved for a judgment of acquittal, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. This oral motion was reduced to writing, and a formal, written, motion for judgment of acquittal was filed the next morning, August 6, 1999, at 8:17 a.m.—before trial resumed. After hearing argument on the Rule 29(a) motion, the district court took it under advisement, in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

After the motion was taken under advisement, Henry Blume Loe offered evidence in his defense. At the close of all the evidence, but *before* the case was submitted to the jury, Henry Blume Loe's motion for judgment of acquittal pursuant to Rule 29(a) was renewed by defense counsel. Again, the motion was taken under advisement by the district court, in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure.

Thereafter, the case was submitted to the jury, which on August 9, 1999, found Henry Blume Loe guilty on all counts. Following the jury's verdict, Henry Blume Loe did *not* move for a post-verdict judgment of acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, but instead filed a *supplement* to the Rule 29 motions that had been made on his behalf prior to the submission of the case to the jury; *i.e.*, the two motions for judgment of acquittal that the district court had taken under advisement. This is clear from the face of the pleading filed on behalf of Henry Blume Loe, which is entitled "Supplemental Brief to Motion for Judgment of Acquittal," and which plainly references the motions that had been taken under advisement by the district court.

On November 3, 1999, the district court entered an "Order" in which it dismissed Counts 1-5 of the superseding indictment

because "**[t]he Court finds [the] evidence to be insufficient to support the jury's verdict on Counts 1 through 5.**" See Appendix C, p. 22a. In this "Order," the district court explicitly stated that it was ruling on the *pre-verdict* motions that it had taken under advisement:

> The court has had under advisement the motion of the Defendant, Henry Blume Loe, for a judgment of acquittal, made both orally and in writing at the time the Government rested its case on August 5, 1999. The Court reserved ruling on the motion. The Defendant renewed his motion after all of the evidence was closed, and the Court again reserved ruling on the motion. The Court has now carefully considered the Defendant's motion, his supplemental brief to motion of judgment of acquittal [*sic*], and is of the opinion that the motion should be granted in part and denied in part.

Appendix C, p.18a.

On November 23, 1999, the Government filed its notice of appeal regarding this "Order." After brief, the Court of Appeals for the Fifth Circuit reversed the district court's judgment of acquittal, finding as follows:

> We recognize that some of the circumstantial evidence in isolation can be read to suggest a possibility other than guilt. But when viewed in the light most favorable to the verdict, neither the total composition of that evidence nor certain items, such as Blume Loe's control over the off-the-books bank account and his statement to Ward after the COE meeting, seem to suggest an equally viable theory of innocence. So long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilty. (citation omitted) that is the case here, and the jury was free to choose among the reasonable constructions of the evidence; one of which was consisted with Blume Loe's guilt. * * *

> Therefore, we reverse the district court's grant of a judgment of acquittal; we direct that the district court reinstate the jury's guilty verdict on Counts 1-5; and we remand for sentencing proceedings consistent with these determinations.

Appendix B, p.10a.

In response, Loe filed a petition for panel rehearing, contending that the opinion of the Court of Appeals violated the double jeopardy clause. This petition was denied. Hence, this petition for a writ of *certiorari*.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In 1962, in *Fong Foo v. United States*, 369 U.S. 141 (1962), this Court held that the entry of a judgment of acquital during the middle of the government's evidence, even though entered for reasons unrelated to the insufficiency of the evidence, barred a retrial of the defendants. In the eyes of the Court, "[the double jeopardy clause] is at the very root of the present case, and we cannot but concude that the guaranty was violated when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense." *Fong Foo, supra*, p.143.

Fong Foo was followed fifteen years later by three cases decided within ten days of each other: *United States v. Wilson*, 420 U.S. 332 (1975); *United States v. Jenkins*, 420 U.S. 358 (1975); and *Serfass v. United States*, 420 U.S. 377 (1975). In *Wilson*, the Court held that the double jeopardy clause did not prohibit the government from appealing post-guilty verdict

judgments of acquittal, when the basis for the judgment of acquittal was an error of law. In the words of the Court:

> * * * . . . we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. (footnote omitted) These interests, however, do not apply in the case of a postverdict ruling of **law** by a trial judge.

Wilson, supra, p.352.

In *Jenkins*, the Court found that a government appeal from the dismissal of an indictment, without a verdict of guilt or innocence, violated the double jeopardy clause, even though the basis for the dismissal was unclear:

> Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this statge would violate the Double Jeopardy Clause: . . .

Jenkins, supra, p.370.

In *Serfass*, the government appealed the pre-trial dismissal of an indictment, a dismissal based on *legal* grounds. Finding that jeopardy had not attached, this Court reinstated the indictment. *Serfass, supra*, p.394.

Just two years later, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court again addressed the government's right to appeal, this time in the context of an appeal following a judgment of acquittal entered pursuant to Fed.R.Crim.Proc.29(c). In *Martin Linen Supply,* this Court found that the double jeopardy clause barred an appeal from an acquittal entered under Rule 29(c), when the jury has failed to reach a verdict. *Martin Linen Supply, supra*, p.575. Significantly, Justice Stevens, concurring in the judgment, found that there "is no statutory authority for a Government appeal from a judgment of acquittal in a criminal case"—regardless of when, or by whom, the acquittal is entered.

All the above cases were revisited by the Court only one year later, in *United States v. Scott*, 437 U.S. 82 (1978). In *Scott,* the Court first overruled *Jenkins*. Then, a divided Court found that the dismissal of two counts of an indictment at the close of the govenment's evidence, for reasons other than insufficient evidence, was appealable by the government:

> * * * We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 3731.

Scott, supra, p.101.

Although the Government's right to an appeal following a judgment of acquittal was addressed again in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), it is accurate to say that *Smalis* breaks no new ground. Nor did any need be broken, until the 1994 amendment to Rule 29.

If any principle is clear from the above cases, it is that once jeopardy has attached, which in a jury trial is when the jury is sworn, any termination of the trial *on the merits*, in the defendant's favor, normally precludes an appeal by the Government. *See, e.g., United States v. DiFrancesco*, 449 U.S. 117 (1980). As Chief Justice Rehnquist noted in *United States v. Scott*, 437 U.S. at 90-91:

> These, then, at least, are two venerable principles of double jeopardy jurisprudence. The successful appeal of a judgment of conviction, *on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, poses no bar to further prosecution on the same charge. *A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.* (emphasis added, footnote omitted).

* * *

Later in the opinion, Justice Rehnquist elaborated upon this principle:

> . . . Despite respondent's contentions, an appeal is not barred simply because a ruling in favor of a defendant "is based on facts outside the face of the indictment," [*United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013 (1975)] *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee* [*v. United States*, 432 U.S. 23, 97 S.Ct. 2141 (1977)], 432 U.S. at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted on when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." [*United States v. Martin Linen Supply Co.*,430 U.S. 564, 97 S.Ct. 1349 (1977)] *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. *Where the court, before the jury returns a verdict,*

> *enters a judgment of acquittal pursuant to Fed.Rule Crim. Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction."* 430 U.S., at 572, 97 S.Ct., at 1355.

Scott, 98 S.Ct., at 2197. (emphasis added).

In this proceeding, the district court did precisely that: it entered a judgment of acquittal, after it determined that the Government's evidence was legally insufficient to sustain a conviction. Moreover, the manner in which the ruling was made had the legal effect of a *pre-verdict* determination—which is precisely and unquestionably what the district court intended. It is also what is envisioned by the separate sections of Rule 29. Had the district court *not* taken the Rule 29 motion under advisement, but instead, ruled upon it at the time it was made, and dismissed the counts, the Government plainly would have had no right to appeal. *See United States v. Martin Linen Supply Co.*,430 U.S. 564 (1977). By reserving its ruling until after the jury's verdict, the district court simply employed the procedure permitted by Rule 29(b)—which permits such reservation, on the condition that the judge consider "the motion on the basis of the evidence at the time the ruling was reserved." In other words, a Rule 29 motion taken under advisement, pursuant to Rule 29(b), should treated as a *nunc pro tunc* motion.

Thus, the granting of a motion taken under advisement pursuant to Rule 29 (b) means, at least from a constitutional perspective, that the counts that were dismissed should not have gone to the jury at all. And if the counts should not have gone to the jury, then the Government certainly has no right to appeal an acquittal on those counts, and their subsequent dismissal, to seek to reinstate them. Constitutionally, there is not, nor could there be, any difference between a motion for acquittal made at the close of the Government's case, *and granted at that time*, and a motion for acquittal made at the close of the

Government's case, but taken under advisement, and granted at a later time. This was the point made by the Supreme Court in *United States v. Martin Linen Supply Co.*,430 U.S. 564, 97 S.Ct. 1349 (1977). In *Martin Linen Supply*, the district court entered a judgment of acquittal under Rule 29(c), after the jury was unable to reach a verdict. The Supreme Court held that the double jeopardy clause prohibited the Government from appealing this acquittal, even though it came after the jury had been discharged, *i.e.*, at a time when the defendant faced the prospect of a retrial even without the Government's appeal:

> Such a limitation on the role of a trial judge, however, has never inhibited his ruling in favor of a criminal defendant. *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), establishing the binding nature of a directed verdict, is dispositive on that point. Since Rule 29 merely replaces the directed-verdict mechanism employed in *Fong Foo*, and accords the federal trial judge greater flexibility in timing his judgment of acquittal, no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy. (footnote omitted). Rather, the Notes of the Advisory Committee have confirmed that Rule 29 intends no substantive alteration in the role of judge or jury but creates a purely formal modification of the directed-verdict device in order "to make the nomenclature accord with the realities." 18 U.S.C. App., p. 4504. *Accordingly, United States v. Sisson, supra, at 290, 90 S.Ct. at 2129, held that Rule 29 recognizes no "legal distinction" between judge and jury with respect to the invocation of the protections of the double jeopardy clause.*
>
> The Government, however, would read *Fong Foo* and, by implication, Rule 29 differently. It argues that the judge's directed verdict in *Fong Foo* was binding for double jeopardy purposes because the formal verdict of acquittal, though on direction, was rendered not by the judge, but by the jury, which then was discharged. *This in effect turns the constitutional significance of a Rule 29*

> *judgment on a matter of timing*. Thus, if the judge orders entry of judgment of acquittal on his own or on defendant's motion prior to submission of the case to the jury, as he may under Rule 29(a), or after submission but prior to the jury's return of a verdict, as authorized by Rule 29(b)—and the jury thereafter is discharged—the Government's argument necessarily concedes that the Double Jeopardy Clause would preclude both appeal and retrial. If, however, the judge chooses to await the outcome of the jury's deliberations and, upon its failure to reach a verdict, acts on a timely motion for acquittal filed under Rule 29(c) within seven days of its discharge, the Government submits that the Double Jeopardy Clause should not bar an appeal.
>
> *We are not persuaded. Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion.*

Martin Linen Supply, supra, pp. 573 -574 (emphasis added).

Plainly, if the Government has the right to appeal all acquittals under Rule 29, except those heard, *and granted* before the case is submitted to the jury, then Rule 29(b) is superfluous—there is no point in taking a motion under submission to await the verdict of the jury, other than to hope that the jury's verdict renders a decision unnecessary. Rules 29(a) and 29(c) would cover all possibilities. Moreover, a reading of Rule 29(b) that subjects a defendant to the possibility of an appeal by the Government, just because a district judge wants to act prudently, is one that indirectly eviscerates the holding of *Jackson v. Virginia*, 443 U.S. 307 (1979).

To put the matter another way: when the Government appeals a judgment of acquittal granted under Rule 29 (c), *i.e.*, on a motion *made after* the jury is discharged, the Government is attempting to reinstate the jury's verdict. This the Court allows. *See United States v. Scott, supra*. However, when the

Government appeals an acquittal on a Rule 29 motion made *before* the jury's verdict, one which is granted on the state of the evidence as it existed *before* the verdict, then the Government is attempting to instate a verdict that as a matter of law, cannot exist. This the Government cannot do, consistent with the Double Jeopardy Clause of the Fifth Amendment.

This Court should grant *certiorari* to consider this important federal question.

CONCLUSION

Wherefore, for the foregoing reasons, this Court is respectfully urged to grant Henry Blume Loe's petition, and to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this proceeding.

New Orleans, Louisiana, this 21st day of December, 2001.

Respectfully submitted,

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* Counsel of Record

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Henry Blume Loe

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Sep. 26, 2001]

No. 99-41372

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HENRY BLUME LOE,
Defendant-Appellee.

No. 99-41506

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY BLUME LOE,
Defendant-Appellant.

Appeals from the United States District Court for the
Eastern District of Texas, Sherman

ON PETITION FOR REHEARING

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Henry Blume Loe is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMOSS, Jr.
United States Circuit Judge

REHG-2

Clerk's Note:
See FRAP and Local Rules 42 for stay of the mandate.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 99-41372

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

Versus

HENRY BLUME LOE,
Defendant-Appellee.

No. 99-41506

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

HENRY BLUME LOE,
Defendant-Appellant.

Appeals from the United States District Court
For the Eastern District of Texas

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.
DeMOSS, Circuit Judge:

In April 1998, a multi-count, superseding indictment was returned against several individuals including Defendant Henry Blume Loe ("Blume Loe"). Among the various counts charged against Blume Loe were those for conspiracy to defraud the United States, submitting false statements, and tax fraud. After several weeks of trial, a jury convicted Blume Loe of all ten counts that were charged against him,

but the district court ultimately granted a judgment of acquittal with respect to five of the counts.

On appeal, the government seeks a reversal of the district court's judgment of acquittal. Blume Loe cross-appeals, hoping to reverse his remaining convictions and sentences. For the following reasons, we affirm the convictions and sentences assessed against Blume Loe, but reverse the district court's judgment of acquittal.

I. BACKGROUND

In 1946, the Loe family started Loe's Highport, Inc. ("LHI"), a marina located on Lake Texoma on property leased from the United States Army Corps of Engineers ("COE"). At the times pertinent to these appeals, Cornelius Dewitte Loe, Jr. ("C.D. Loe"), and Babo. Beazley Loe ("Babo Loe") operated LHI. Of their three sons, only Blume Loe worked at the marina. Neither Cornelius Dewitte Loe, III, nor William Loe played a significant role in the marina's operations, and neither was charged with any criminal activity in the indictment.

In 1996, the Federal Bureau of Investigation executed a search warrant on the marina facilities of LHI, which later culminated in the multi-count indictment against Blume Loe, C.D. Loe, Babo Loe, and others. Not all of the counts were pressed against all of the defendants. Thereafter, the district court partially granted a motion to sever, and a trial on some of the counts against some of the defendants occurred. That first trial pertained to Counts 17, 22-25, and 29-31 of the multicount indictment and did not involve Blume Loe. The second trial concerned the remaining counts and included Blume Loe as a defendant. Approximately five weeks into the second trial, however, one of Blume Loe's attorneys became ill and was unable to proceed. As a result, the district court severed Blume Loe's case and continued the trial with the remaining defendants.

When the government finally proceeded with the third trial against Blume Loe, he faced ten criminal counts, generally grouped into three categories. First, Counts 1-5 charged Blume Loe with conspiracy to defraud the COE and related substantive acts of submitting false statements. Under the lease agreement with the COE, LHI owed rent based upon a percentage of the gross receipts of its business. LHI reported the rent to be paid on a COE form called the "Graduated Rent System Rental Computation Form." Count 1 alleged that Blume Loe entered into a conspiracy to defraud the COE by submitting false rental numbers, and Counts 2-5 complained of individual substantive acts of submitting false statements. Second, Counts 12-15 charged Blume Loe with making false statements on his personal income tax returns for the 1992-95 tax years. The government maintained that in the returns for those years, Blume Loe underreported his income and did not include as compensation thousands of dollars that he received from an off-the books account of LHI. Third, Count 16 charged Blume Loe with failing to file a Form 8300, a document required to be filed with the Internal Revenue Service whenever a person receives $10,000 or more in cash or cash equivalents in a business transaction. Specifically, the government alleged that Blume Loe sold a boat to Gene DeBullet in or around November 1994 for $21,000 in cash and that Blume Loe failed to file a Form 8300 reporting that transaction.

The jury convicted Blume Loe on all counts, but the district court granted a judgment of acquittal with respect to Counts 1-5.[1] In general, the district court held that there was no evidence that Blume Loe had anything to do with completing or filing the rental reports with the COE or in supervising those persons who did. The government filed this

[1] Blume Loe moved for a judgment of acquittal on all counts after the close of the government's case in chief. The district court took the matter under, advisement and filed an order three months after trial had ended.

appeal to seek review of that judgment. Blume Loe cross-appeals, maintaining that: 1) there was insufficient evidence to support his convictions for the other five counts; 2) the district court erred in calculating his sentence; 3) the district court made improper evidentiary rulings; and 4) the district court should have granted his motion for a mistrial based on prejudicial communications between the jurors and others.

II. DISCUSSION

A. Counts 1-5

The government maintains that the district court erred in granting Blume Loe's motion, pursuant to Rule 29, for a judgment of acquittal on Counts 1-5. When reviewing such a decision, we give no deference to the district court's ruling. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 616 (5th Cir.1991). Instead, we review de novo a district court's grant of a judgment of acquittal, applying the same standard as the district court. *United States v. Sanchez*, 961 F.2d 1169, 1179 (5th Cir.1992). That standard asks. whether a reasonable jury could conclude that the relevant evidence, direct or circumstantial, established all of the essential elements of the crime beyond a reasonable doubt when viewed in the light most favorable to the verdict. See *United States v. Scott*, 159 F.3d 916, 920 (5th Cir.1998). The standard does not require that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable. doubt. *Baytank*, 934 F.2d at 616. "'A jury is free to choose among reasonable constructions of the evidence.'" *Id.* (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en bane)). And it retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of the witnesses. *United States v. Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998).

As previously noted, Count 1 alleged that Blume Loe, his mother Babo Loe, and others entered into a conspiracy to defraud the COE by submitting false rental numbers, in violation of 18 U.S.C. § 371, and Counts 2-5 complained of individual substantive acts of submitting false statements, in violation of 18 U.S.C. § 1001.[2] The crux of those five charges pertained to the conspiracy charge as the individual substantive act counts were, predicated on *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).[3] To establish a violation of 18 U.S.C. § 371, the government must establish beyond a reasonable doubt: 1) than two or more people agreed to pursue an unlawful objective; 2) that the defendant voluntarily agreed to join the conspiracy; and 3) that one or more members of the conspiracy committed an overt act in furtherance of the conspiracy. United States v. Dien Due Huynh, 246 F.3d 734, 745 (5th Cir.2001).

Here, the district court generally observed that "[t]here is no evidence that Henry Blume Loe had anything to do with completing or filing the rental reports with the Corps of Engineers or supervised those persons who did." It further recited the substance of various aspects of the government's evidence: 1) testimony and written job descriptions indicating that Blume Loe had an important role and major duties at

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[2] The indictment also referred to the aiding and abetting statute, 18 U.S.C. § 2.

[3] "In Pinkerton, the Supreme Court held that ,a party to a conspiracy may be held responsible for a substantive offense committed by a coconspirator in furtherance of a conspiracy, even if that party does not participate in or have any knowledge of the substantive offense.'" *United States v. Gobert*, 139 F.3d 436, 439 n. 22 (5th Cir.1998) (quoting *United States v. Jensen*, 41 F.3d 946, 955-56 (5th Cir.1994)). Blume Loe's liability for the substantive offenses appears to be based on his coconspirators' actions, which were apparently clear violations of 18 U.S.C. § 1001. Blume Loe does not challenge the government's reliance on Pinkerton for Counts 2-5.

LHI; 2) testimony stating that Blume Loe was brought in to run the business; 3) testimony observing Blume Loe's attendance in Babo Loe's office discussing marina business; 4) and testimony from Marie Ward, a coconspirator of Babo Loe's, that Blume Loe returned from a meeting with the COE and stated certain possibly incriminating statements. Despite the standard of review afforded motions for judgments of acquittal, the district court found the evidence insufficient. Ultimately, the district court seemed persuaded by the fact that there was no direct evidence of Blume Loe's participation in accounting functions and by the fact that, regardless of any title held by Blume Loe, the bulk of the evidence showed that Babo Loe ran the marina.

Babo Loe's management of LHI, however, does not mean that Blume Loe did not or could not have entered into a conspiracy as to the underreporting of boat sales. Admittedly, none of the evidence presented to the jury directly linked Blume Loe with the COE reports. The government's case clearly rested on circumstantial evidence. We, however, do not differentiate between direct and circumstantial evidence when reviewing a grant of a judgment of acquittal. *See Scott*, 159 F.3d at 920. The key issue then is whether the circumstantial evidence established all of the essential elements of the crime beyond a reasonable doubt, and we must draw all reasonable inferences from that evidence in favor of the verdict.

Doing so, we find that the evidence cited by the district court, and the evidence it did not mention, sufficient to convict Blume Loe of a § 371 violation. A reasonable inference from the testimony about Blume Loe being the "heir apparent" of the marina-business and from the job descriptions and other evidence indicating Blume Loe's level of responsibility at the marina is that he knew about the underre-

porting of boat sales.[4] It is not unreasonable to infer that a son presumed to be the next head of the corporation would probably know what is going on with the affairs of that business, especially in light of his frequent meetings with the parent that supposedly ran the business. Furthermore, the jury could have reasonably concluded that Babo Loe would not have sent Blume Loe to meet with the COE, where the parties talked about matters such as future development and the new lease format, unless he had some knowledge regarding the reporting of boat sales. And most importantly, a reasonable inference from Ward's testimony about the statements made by Blume Loe after he returned from meeting with the COE is that he knew about LHI's underreporting. Ward testified on direct testimony that after returning from the COE meeting in Tulsa, Blume Loe said that "the Corps told him that everyone kept two sets of books." On cross, she responded positively to defense counsel's question as to whether Blume Loe told her that the COE stated that LHI was due a refund because LHI had been overpaying for brokerage boats and that he wanted her to go back and try to calculate the refund. Later on redirect, Ward elaborated, stating that she told Blume Loe that she did not have time and that the recalculation "wouldn't offset the other changes [LHI] had already made." By "other changes," Ward meant prior underreporting by LHI. The jury could have reasonably inferred that Ward's statement that any new calculations would not offset the previous other changes reflected a common knowledge and tacit agreement by the parties involved in the underreporting. There is no evidence showing that Ward had to define "other, changes" to Blume Loe or that Blume Loe responded in any fashion demonstrating innocence: Rather, the evidence in the record seems to

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[4] One of the descriptions denoted his responsibilities as including 1) the supervision of employees in all departments, 2) the review of weekly payroll and sales reports, and 3) the review of monthly corporate financial statements.

suggest that Blume Loe accepted, without challenge, Ward's comments. Thus,, even the evidence recited by the district; court could reasonably create the. inference in the minds of the jurors that Blume Loe knew of and was involved in the reporting of the COE forms.

What is also equally damning of Blume Loe is the evidence that the district court failed to discuss in its order. Besides failing to note that Blume Loe sought the COE meeting, where the. parties. discussed future development and the new lease format, the district court did not evaluate in its order Blume Loe's control and access over the bank account where LHI kept the proceeds of the boat sales that were not reported to the COE, and which he definitely utilized for personal purposes. With respect to that latter fact, a jury could have reasonably inferred that a person utilizing thousands of dollars from a bank account would have had some knowledge of how that money got there and had some direction in the money's procurement.

We recognize that some of the circumstantial evidence in isolation can be read to suggest a possibility other than guilt. But when viewed in the light most favorable to the verdict, neither the total composition of that evidence nor certain items, such as Blume Loe's control over the off-the-books bank account and his statements to Ward after the COE meeting, seem to suggest an equally viable theory of innocence. So long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. *Baytank*, 934 F.2d at 616. That is the case here, and the jury was free to choose among the reasonable constructions of the evidence: one of which was consistent with Blume Loe's guilt. *Id.* Therefore, we reverse the district court's grant of a judgment of acquittal; we direct that the district court reinstate the jury's guilty verdict on

Counts 1-5; and we remand for sentencing proceedings consistent with these determinations.

B. Counts 12-15

On his cross-appeal, Blume Loe questions the sufficiency of the evidence with respect to his convictions for Counts 12-15. Those counts charged Blume Loe with making false statements on his personal income tax returns for the 1992-95 tax years, in violation of 26 U.S.C. § 7206(1).[5] During each of those years, besides his normal salary compensation, Blume Loe received approximately $90,000, which he used to pay the premiums on a life insurance policy on Babo Loe. He also received various smaller amounts, which were not utilized for the life insurance premiums. The monies given to Blume Loe came from the off-the-books account, into which LHI diverted sales income that it did not report to the COE. Blume Loe's tax returns did not include the extra monies as income. According to Blume Loe, the government did not establish a violation of § 7206(1) because it failed to prove 1) that the extra monies constituted compensation or taxable income and 2) that he knew that the income was taxable income.

We need not expend too much energy on Blume Loe's arguments as they are unavailing. The government introduced substantial evidence reflecting Blume Loe's guilt. First, Babo Loe maintained "commission files" that indicated that much of the additional monies received by Blume Loe were commission payments, i.e., taxable income. Second, several government exhibits showed that Blume Loe claimed a salary in excess of $100,000 a year, far more than the $52,000 that

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[5] To establish a violation of § 7206(1), the government must show that 1) the accused willfully made and subscribed to a tax return, 2) the return contained a written declaration that it was made, under penalties of perjury, and 3) the accused did not believe that. the return was true as to every material matter. *United States v. Mann*, 161 F.3d 840, 848 (5th Cir.1998).

he noted on his income tax returns. Third, after the government began its investigation of LHI and the Loes, Blume Loe's 1996 w-2 form suddenly complied with the greater income figures, reporting that he made in excess of $100,000. Fourth, Blume Loe left a job making more than $100,000 a year to come work at LHI. The jury could have reasonably inferred that Loe would not have taken a 50% pay cut unless other remuneration would be provided. Fifth, the jury could have reasonably concluded that based on the fact that Blume Loe oversaw the sales department and reviewed the salesmen's commissions and the fact that he himself was eligible for those commissions, Blume Loe knew that he would receive more than the reported $52,000 salary. Finally, the jury could have reasonably inferred from LHI's and the Loes' underreporting of boat sales that LHI would need a way to dispose of some of the extra funds and that under-the-table money to Blume Loe would be a good candidate for such funds. In light of all the proffered evidence, we believe that sufficient evidence existed for the convictions on Counts 12-15.

C. Count 16

Blume Loe also appeals his conviction on Count 16, which charged Blume Loe with failing to file a Form 8300, a document required to be filed with the Internal Revenue Service whenever a person receives $10,000 or more in cash or cash equivalents in a business transaction, in violation of 26 U.S.C. §§ 6050I(a) and 7203. Specifically, the government alleged that Blume Loe sold a boat to Gene DeBullet in or around November 1994 for $21,000 in cash and that Blume Loe failed to file a Form 8300 reporting that cash transaction. In his brief, Blume Loe generally contends that the evidence was insufficient because he was not present during the actual cash transaction nor directed anyone not to file .the form. Instead, he maintains that he told ward to write out a receipt for DeBullet.

Having reviewed -the considerable evidence proffered by the government, however, we find Blume Loe's argument meritless. Although he initially contends,. and points to evidence, that he was not the one who received the cash from DeBullet for the boat sale, other testimony contradicts that view. We must defer to the jury's assessment of credibility and accept its apparent belief that Blume Loe obtained the cash from DeBullet and then gave it to Ward. The evidence clearly established that before the DeBullet sale, Blume Loe knew about the reporting requirement, that he had personally made boat sales exceeding $10,000 in cash, and that he had attempted to divert those funds so as to escape the reporting requirement. Furthermore, the evidence revealed that Blume Loe lied to the IRS about not having done cash sales greater than $10,000, that he refused to turn over records to the IRS, and that neither he nor. LHI had ever filed a Form 8300 on sales exceeding $10,000. Thus, at the time of the DeBullet sale, the evidence suggested that the jury could reasonably infer that Blume Loe had the intent and knowledge to do the crime.

Of course, Blume Loe insists that he bears no responsibility because he instructed Ward to document the transaction and because he never told her not to ' do the Form 8300. But asking Ward to document the sale does not mean that he wanted her to do the form. Instead, the record indicates that LHI's routine was not to file the Form 8300; hence, a reasonable inference could have been that Blume Loe was relying upon Ward to do the regular thing and not file it. In any case, evidence showed that Blume Loe was the person responsible for filing the Form 8300, and he cannot escape blame for failing to do that act. Accordingly, we reject his sufficiency of the evidence challenge as. to Count 16.

D. Evidentiary Rulings

Besides his sufficiency of the evidence claims, Blume Loe argues that the district court committed an "identifiable

pattern of consistently erroneous evidentiary rulings that disregarded the evidentiary requirements and resulted in cumulative error that was harmful in nature." He charges that the district court "repeatedly allowed summary witnesses with no personal knowledge whatsoever of the events at issue to testify as to documents, about which they had no personal knowledge." In addition, Blume Loe contends that the district court admitted documents that were never properly authenticated and that were never shown to be admissible business records.

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Wilson*, 249 F.3d 366, 374-75 (5th Cir.2001). After reviewing Blume Loe's specific allegations, the district court's rulings, and the applicable law, we find no such abuse. Accordingly, the district court's evidentiary rulings 'are affirmed.

E. Alleged Sentencing Errors

Blume Loe also avers that the district court erred in its calculation. With respect to that claim, he. points to several purported mistakes. First, Blume Loe maintains that the money he received and then used to pay the life insurance premiums each year should not have been included in the tax loss calculation for 1993-95. Second, he argues that the district court erred in evaluating LHI's purchase of a home in 1990 on his behalf as relevant conduct and in including the "tax due" on that house in the tax loss calculation. Third, Blume Loe believes that the district court's decision to include the value of the home as taxable income for the tax loss calculation violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466,120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[6] Fourth, Blume Loe challenges the district court's inclusion in its tax loss calculation $34,314.92 that Babo

[6] *Apprendi* he that any fact; other than" a prior conviction, that ` increases the penalty for a crime beyond the prescribed statutory maximum must be 'submitted to a jury. 120 S.Ct. at 2363-64.

Loe's notes indicate were paid "tax-free" to Blume Loe. He states that the evidence is unclear as to whether he received the money and that Babo Loe's intent was to give the funds tax-free. Finally, Blume Loe contends that the district court wrongly utilized a 34% corporate tax rate in calculating the tax loss, rather than the applicable 28% rate.

We review the district court's interpretation and application of the sentencing guidelines de novo. *United States v. Hill*, 42 F.3d 914, 916 (5th Cir.1995). On the other hand, factual findings of the district court, such as what constitutes relevant conduct, must be supported by a preponderance of the evidence and are reviewed for clear error. *United States v. Nevels*, 160 F.3d 226, 229 (5th Cir.1998). An amount of loss finding is also reviewed for clear error. *Hill*, 42 F.3d at 919.

Upon reviewing Blume Loe's arguments, the record, and the applicable law, we find his points of error unavaling. With respect to his first point, it resembles his sufficiency of the evidence claims against Counts 12-15. We previously found the evidence sufficient for. Counts 12-15; and here; despite the different standard, we find no clear error in the district court's assessment to include the $90,000 per, year payments in the tax loss calculation. Likewise, we do not believe that the district court clearly erred in including the home and its value. The evidence revealed that , Blume ' Loe "took" a substantial pay cut to come to LHI, and the district court could have reasonably inferred that the house was intended to be additional compensation. That finding is buttressed, by the fact that Blume Loe's compensation suddenly jumped after the government began its investigation of LHI and the Loes. The district court could reasonably infer from that sudden jump that Blume Loe's actual compensation in the earlier years included the value of . the home and that he was merely not reporting it. Additionally,. including the home's value as relevant conduct did not amount to an

Apprendi violation. Contrary to Blume Loe's assertion, the district court's consideration of the home's value did not result in a sentence in excess of the statutory maximum. Blume Loe received a sentence well within the three-year statutory maximum for a violation of § 7206(1). As for Blume Loe's contention that the district court should not have included.the $34,314.92 that Babo Loe purportedly gave tax-free, we again conclude that the district court did not clearly err. That sum was part of the amount that formed the basis of Count 14, and the government meticulously traced ;the checks and the funds that comprised virtually. all of the contested amount to LHI corporate funds. Finally, we see no support for Blume Loe's that the district court applied an incorrect tax rate. The revised presentence report reflects application of a 28%; not 34%, tax rate. In light of the preceding, we conclude that Blume Loe's contentions with respect to his sentence are without merit.

F. Mistrial

The final item in Blume Loe's cross-appeal relates to the district court's denial of his motion for a mistrial based on allegations of juror misconduct. We review such denials for abuse of discretion. *United States v. Denman*, 100 F.3d 399, 405 (5th Cir.1996).

Here; two allegedly improper contacts with the jury occurred. In the first incident, one of the bailiffs essentially told the jurors that the present case had been previously tried with other defendants, that the case had to be severed because of health problems associated with one of the defense counsel, that the district court believed that the case should be decided within three weeks, and that the trial could last much longer if it did not end in three weeks. Upon learning of the possible length of the trial, the jurors all groaned. In the. second incident, a juror ran into one of the government's witnesses during lunch. That witness told the juror that he was testifying for the second time due to the prior trial being

called off because of a defense counsel's heart attack. When the district court became aware of the two incidents, it conducted interviews with each juror. The district court found no prejudice and continued with the trial, although it did remove the offending bailiff.

Blume Loe contends that through the contacts, inadmissible information reached the jury, abridging, his Sixth Amendment right to confront the evidence against him and resulting in convictions based in part on guilt by association. We disagree. None of the communications arising from the contacts were material or prejudicial. They did not inform the jurors about the outcome of the prior trial nor did they cast any aspersions on Blume Loe or the other defendants in the prior trial. Furthermore, the communications did not concern any facts that would necessarily have been a focus of cross-examination by the defendant. Consequently, we conclude that the district court did not abuse its discretion in denying Blume Loe's motion for a mistrial based on allegations of juror misconduct.

III. CONCLUSION

For the foregoing reasons, we affirm, the convictions for Counts 12-15 and for Count 16; we reverse the grant of a judgment of acquittal on Counts 1-5; we direct that the district court reinstate the jury verdict of guilty on Counts 1-5; and we remand the case for resentencing consistent with this opinion.

APPENDIX C

[Filed Nov 3, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

No. 4:97cr71

UNITED STATES OF AMERICA,

v.

HENRY BLUME LOE.

ORDER

The Court has had under advisement the motion of the defendant, Henry Blume Loe, for a judgment of acquittal, made both orally and in writing at the time the Government rested its case on August 5, 1999. The Court reserved ruling on the motion. The Defendant renewed his motion after all of the evidence was closed, and the Court again reserved ruling on the motion. The Court has now carefully considered the Defendant's motion, his supplemental brief to motion for judgment of acquittal, and the Government's response to the motion, and is of the opinion that the motion, should be granted in part and denied in part.

Defendant was charged in Count 1 of a Superseding Indictment with conspiracy to defraud the United States Army Corps of Engineers, in violation of 18 U.S.C. § 371, and with aiding and abetting, in violation of § 2. Count 1 of the Superseding Indictment alleged that Defendants Babo Beazley Loe, Henry Blume Loe, Loe's Highport, Inc., and others known and unknown to the grand Jury, knowingly and

willfully entered into an agreement to defraud the United States Army Corps of Engineers by submitting or causing to be submitted materially false and fraudulent graduated rent system rental computation forms which under reported sales and rents and services income from which total rent due the Corps of Engineers by Loe's Highport, Inc. was calculated. Counts 2 through 5 of the Superseding Indictment charged Babo Beazley Loe, Henry Blume Loe and Loe's Highport, Inc. with making materially false and fictitious statements and representations for the purpose of misleading the Tulsa District of the United States Army Corps of Engineers by understating the gross income of Loe's Highport, Inc., on which the rental payments from the corporation to the Corps of Engineers were based, for the first quarter of 1994, the second quarter of 1994, the first quarter of 1995, and the second quarter of 1995, in violation of 18 U.S.C. § 1001 and § 2.

In Counts 12 through 15 of the Superseding Indictment Henry Blume Loe was charged with making a false statement on his income tax return for certain years, in violation of 22 U.S.C. § 7206(l). Count 16 of the Superseding Indictment charged Defendant Henry Blume Loe with a violation of 26 U.S.C. § 6050I(a) by causing Loe's Highport, Inc. to fail to file a return with respect to the receipt of cash in excess of $10,000.

Defendant was found guilty on all of these counts. Defendant argues in his motion for judgment of acquittal that there is insufficient evidence to support the jury's verdict as to all counts.

Standard of Review

In ruling on Defendant's motion for judgment of acquittal, made pursuant to Rule 29, Federal Rules of Criminal Procedure, the Court should view the evidence in the light most favorable to the Government and determine whether the

evidence could be accepted by a jury as adequate and sufficient to support the conclusion of the Defendant's guilt beyond a reasonable doubt. *United States v. Sanchez*, 961 F.2d 1169, 1179 (5th Cir.1992) The Court is not to weigh the evidence or assess the credibility of witnesses, and the Court is not to substitute its own views of justice for those of the jury. This test applies whether the evidence being considered is direct or circumstantial. *United States v. Austin*, 585 F.2d 1271 (5th Cir.1978). The Court must accept the jury's verdict if any rational trier of fact could have found the Defendant guilty beyond a reasonable doubt.

Counts 1 through 5

The Government relies almost entirely on circumstantial evidence to support the Defendant's conviction on Counts 1 through 5. Defendant is the son of Babo Beazley Loe and C. DeWitte Loe. Babo Bentley Loe and C. DeWitte Loe operated a marina on Lake Texoma known as Loe's Highport through the corporation Loe's Highport, Inc. The stock of the corporation was owned by C. DeWitte Loe and C. DeWitte Loe III.

In order to carry its burden of proof on Count 1, the Government must have demonstrated beyond a reasonable doubt that (1) there was an agreement between two or more persons to defraud the U.S. Army Corps of Engineers, (2) Henry Blume Loe knew of the agreement, and (3) he voluntarily joined in that agreement.

There is evidence that Henry Blume Loe had anything to do with completing or filing the rental reports with the Corps of Engineers or supervised those persons who did. His mother did that. There is no evidence that he instructed anyone on how to complete and file these reports, was present when any other person discussed the completion or filing of the reports, that he ever discussed the completion or filing of the reports with anyone, or that he maintained or was responsible for

maintaining any records used in the filing of the reports. The Government's case rests entirely upon the following: (1) the Defendant Henry Blume Loe was either the sales and service manager or marina manager (he was described by different Government witnesses as occupying all three of these positions at various times); (2) he spent a lot of time in his mother's office presumably discussing business; (3) he was brought in by his mother and father to run the business; (4) his written job description and (5) the testimony of a known co-conspirator of Babo Beazley Loe that he returned from a meeting with the Corps of Engineers and stated, "that the Corps told him that everyone kept two sets of books."

There certainly is sufficient evidence to support a finding of the jury beyond a reasonable doubt that there was a conspiracy between Babo Beazley Loe, Marie Ward, Connie O'Neal, and Loe's Highport, Inc. to defraud the Corps of Engineers by under reporting boat sales. The question is whether or not the Defendant Henry Blume Loe's presence at the marina as either the service manager, boat sales manager, or marina manager, coupled with evidence that he spent a lot of time in his mother's office presumably discussing business, and a statement allegedly made by him when he returned from his meeting with the Corps of Engineers are sufficient to prove beyond a reasonable doubt that Henry Blume Loe knew of the conspiracy and voluntarily joined in that conspiracy. In order to support his conviction on this count, the jury must have been able to infer from the meetings with his mother, his statement after he returned from his meeting with the Corps of Engineers, and his position at the marina, that he knew of the agreement or conspiracy to underreport boat sales and he voluntarily joined in that conspiracy. The Court is persuaded that the evidence is insufficient to prove these elements beyond a reasonable doubt.

In making this determination, the Court is mindful that the Court must give the Government the benefit of all reasonable inferences and credibility choices and that a defendant's guilty knowledge and a defendant's participation in a conspiracy all may be inferred from the "development and collocation of Circumstances." *U.S. v. Posada-Rios*, 158 F.2d 832 (5th Cir. 1998), *quoting United States v. Maltos*, 985 F.2d 743, 746 (5th Cir.1992). However, mere presence and association alone are not sufficient to support a conviction. The Fifth Circuit in *U.S. v. Maltos*, 985 F.2d 743, 746 (5th Cir.1992) stated

> While presence or association is one factor that the jury may rely on, along with other evidence, in finding conspireatorial activity by a defendant, it is well established that mere presence at the crime scene or close association with conspirators, standing alone, will not support an inference of participation in the conspiracy.

The *Maltos* court went on to state that "we have repeatedly stressed that we will not lightly infer a defendant's knowledge of and participation in a conspiracy."

According to the evidence, regardless of any title Henry Blume Loe had, his mother, Babo, *ran* the marina. Henry Blume Loe had nothing to do with accounting functions or bookkeeping. The only evidence that connects Henry Blume Loe to the offenses charged in Counts 1 through 5 is what a rational jury could infer from his position at the marina, his visiting with his mother, and the remark he made after his meeting with the Corps of Engineers. The Court finds this evidence to be insufficient to support the jury's verdict on Counts 1 through 5.

The Court has concluded that Defendant's motion for judgment of acquittal on Counts 1 through 5 should granted.

Counts 6 through 16

The Court has reviewed the evidence with respect to these counts and has concluded that the evidence is sufficient to support the jury's finding of guilt on each count beyond a reasonable doubt. Defendant's motion for judgment of acquittal on these counts should be denied.

IT IS SO ORDERED.

SIGNED this 3rd day of November, 1999,

/s/ Illegible
UNITED STATES DISTRICT JUDGE